STATE OF MICHIGAN

COURT OF APPEALS

MARKIESA DEVONN ALLEN, by her next friend, MARKUS D. ALLEN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED February 27, 2014
v	No. 313307 Saginaw Circuit Court
STEPHEN M. GAUS, and SMITH BOVILL, P.C., Defendants-Appellees/Cross-Appellants.	LC No. LC No.09-007428-NM

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals from the trial court's grant of summary disposition in favor of defendants on her legal malpractice claim. Plaintiff's claim concerns defendant's performance as legal counsel to plaintiff's mother's estate in a wrongful death case against Covenant Hospital of Saginaw. Plaintiff alleges that defendant Stephen Gaus, an attorney, failed to properly investigate and prosecute two viable claims before engaging in settlement negotiations and recommending that the estate enter into a settlement agreement. Specifically, she alleges that Gaus failed to investigate (a) the viability of a negligence claim that would not be subject to the noneconomic damages cap applicable to medical malpractice claims, MCL 600.1483, and (b) the viability of a claim for economic damages under any theory of liability. As a result, plaintiff claims, the estate's wrongful death case was settled for an amount substantially less than what would have been obtained with proper legal representation.

I. FACTS

Plaintiff's mother, Yvonne Huffman, was 32 years old when she died of cardiopulmonary arrest on October 25, 2006 at Covenant Hospital in Saginaw, Michigan. Plaintiff is the only child of Yvonne. Following Yvonne's death, Covenant's risk manager, Rebecca Schultz, contacted Frances Huffman, Yvonne's mother and the estate's personal representative. Schultz stated her belief that nurses had failed to timely respond to Yvonne's nurse call light, which she believed contributed to her death. Schultz expressed, on behalf of Covenant, a willingness to pay a settlement.

Schultz told Frances that "we could try and resolve the case between us or she's more than welcome to go get an attorney to file a suit, but if they filed suit, we would be wanting to

resolve the case versus take it through a long, drawn-out process because the nurses fell short." Although Frances expressed a desire to only deal with Schultz, Schultz recommended that she obtain an attorney's representation in the matter. Schultz recommended Gaus because he "has done work for the hospital in the past, he's been codefendants on other cases as well, so I've known him through work." Frances testified that Schultz made it clear that she "did have the right to choose someone else."

Gaus recalled speaking to Schultz about this matter in February 2007 and first spoke with Frances in March 2007. Frances met with Gaus numerous times and "he made it clear that I didn't have to use his services; that I could get another attorney if I wanted to." Frances signed a conflict-of-interest waiver that provided, in relevant part:

> I have been in consultation with Rebecca Schultz, Risk Manager of Covenant Healthcare System regarding the possibility that my daughter's estate may have a claim against the hospital or members of its staff concerning the death of my daughter. If possible, I wish to resolve this matter for myself and for the estate without having to file a lawsuit, to hire experts, go through the delay and emotions that litigation would bring as well as the uncertainties of trial.
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> To this end, Ms. Schultz advised that she would be willing, on the part of the hospital, to pay an attorney to . . . handle the paperwork associated with the settlement of such a claim. She has suggested that Stephan M. Gaus of the firm of Smith Bovill, P.C. is known to her to be knowledgeable and capable in this area of the law.
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> I understand that Stephan M. Gaus and his firm handle legal matters for the hospital on occasion and that this is a potential conflict of interest. I understand that as part of the accommodation offered by the hospital that the hospital is willing to pay the firm of Smith Bovill, P.C. to represent me and my daughter's estate, and to waive the potential conflict of interest . . . .
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> * * *
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> Knowing these things, I wish to:
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> - retain the services of Smith Bovill, P.C. to assist me in the handling of the claim, including the filing of estate papers to set up the estate;
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> - to waive the potential conflict of interest as outlined above;
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> - to have the attorney paid by the hospital on an hourly basis rather than to pay an attorney a third of the settlement on a contingent basis;
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> - to allow the attorney to communicate as needed with representatives of the hospital and their insurer in order to present and resolve the claims.

Frances stated that Gaus went over every line of the waiver and that she understood it.

Frances also signed a retention document that described the services that Gaus was expected to provide. It stated in relevant part: "We will serve as counsel in connection with the specific matter that you have retained us which involves wrongful death. We will render the ordinary and necessary legal services required in the course of this representation."

Gaus testified that he met several times with Frances to understand her concerns and provide advice. He understood Frances's primary goals as a lack of delay, the desire to avoid not getting any recovery at all, and to obtain funds for plaintiff's education. Gaus acknowledged that he did not hire any expert witnesses nor investigate whether there was a good faith argument that Frances's claim lay in ordinary negligence as opposed to or in addition to medical malpractice. He stated that he did not do so because Frances did not request that action and because "[t]he scope of the representation was [to] establish an estate and negotiate a settlement."

Gaus represented the estate in settlement negotiations with Covenant that ultimately resulted in a $450,000 settlement. All of the potential beneficiaries of the estate executed forms consenting to the settlement. $250,000 was placed into a structured annuity to pay for plaintiff's care and future education while the remaining $200,000 was distributed to Yvonne's surviving relatives. Covenant also agreed to waive Yvonne's $22,000 medical bill. Following the filing of this lawsuit, Schultz testified that the hospital had been prepared to pay up to $500,000 to obtain settlement.

The settlement and distribution were approved by the Saginaw Probate Court on December 11, 2007. The court confirmed Frances's desire to enter into the settlement agreement. Gaus testified that the probate court was aware that he had represented Covenant in the past. He stated that he showed the court the signed waiver, which apparently satisfied the court's inquiry.

Plaintiff brought this legal malpractice claim against defendants on December 16, 2009. The gravamen of the claim is that defendant did not consider, investigate or advise the estate as to the availability of a suit in negligence and/or a claim for economic damages, either of which would have significantly increased the potential recovery in suit or settlement.

"The elements of legal malpractice are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury, and (4) the fact and extent of the injury alleged." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). In the instant appeal, the causation element is at issue. "In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. This is the 'suit within a suit' requirement in legal malpractice cases." *Id*. (citation omitted). In other words, to prevent summary disposition in favor of defendants, plaintiff must show that a viable claim existed in ordinary negligence and/or economic damages. If not, defendants cannot be held liable for their admitted failure to investigate such claims.

Plaintiff submitted the testimony of two Michigan attorneys as experts to support her case. One testified that he has tried approximately 60 medical malpractice cases, representing both plaintiffs and defendants. He testified that Gaus committed legal malpractice, stating, in relevant part:

> I think it was a violation of the standard of practice for Mr. Gaus to accept this representation. I think that he was presented with a conflict of interest that was not waivable. I think that he anticipated future work from the hospital, and as a consequence, consciously or unconsciously, is beholden to the hospital and does not have a true ability to be not conflicted by his expectation of future work with the hospital.
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> * * *
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> I think it was a violation of the standard of practice not to entertain other theories of liability other than medical malpractice. [Gaus] says in his testimony that he never even considered anything other than a professional negligence malpractice action . . . .

This expert further stated that he believed that the case was "settled for less than full value" because a viable ordinary negligence claim can elevate the settlement value, due to the lack of a cap on damages, and because

> the research that I found suggest that similar cases for the death of a relatively young woman where she can – the family can demonstrate that there was the prospect of employment and support for minor children, settlement value is in the range of [$]800,000 to $1 million because of the factors that involve salary, lifetime expectation for earnings and the needs of the kids . . . .

He appeared to base this estimate, however, on general knowledge, not on a specific analysis of Yvonne's circumstances. He stated that he had a "general sense that [Yvonne] would live into her 60s," despite her sickle cell trait; he admitted that this estimation was based on "just general reading, New York Times[,]" not on any specialized knowledge or research.

Plaintiff's second expert testified that he has tried approximately 20 medical malpractice cases, primarily in defense. He also concluded that Gaus committed legal malpractice, stating:

> I believe it's a violation of the standard of care of a lawyer practicing in this area, medical malpractice, to represent the plaintiff in a potential lawsuit where that lawyer or members of his firm represent the defendant in other matters. That's number one.
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> Number two, I believe it is a violation of the standard of practice for a lawyer to represent a claimant against a potential defendant while being paid by the potential defendant, that there is an obvious and irresolvable conflict there.

* * *

> And three, I believe it is a violation of the standard of care for somebody representing a claimant to negotiate a settlement without knowing the facts of the case.

When asked for his "opinion about damages" in Yvonne's case, he stated:

> Well, I don't know precisely what a jury would determine the damages to be, but my best estimate is in the – in this case would be in the [$]600[,000] to $800,000 range, it could be as much as a million, could be less, that's my best estimate.

However, this estimate was not based in a factual valuation of Yvonne's circumstances but generally on "the range of damages in the death of a single mom and an adolescent girl." When questioned about the underlying medical malpractice case, he stated that he had not evaluated it and, "If I was going to evaluate the underlying case, I would like to see much more information than I have."

Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that plaintiff could not establish that a viable claim of ordinary negligence against Covenant existed, and, therefore, could not show that Gaus committed legal malpractice by failing to investigate such a claim. The trial court agreed with defendants, finding that "Plaintiff has not shown that a claim of ordinary negligence existed against a hospital agent or employee with respect to their roles in handling the echocardiogram test results." The court also noted that even assuming, arguendo, that plaintiff could establish the negligent handling of the echocardiogram results, she submitted no medical expert testimony to establish that the allegedly delayed delivery of the results proximately caused Yvonne's death. The court also found that the nurses' delay in responding to Yvonne's alarm sounded in medical malpractice, not negligence.[1]

II. ORDINARY NEGLIGENCE

Whether plaintiff's ordinary negligence claim would have succeeded is a question of law for this Court to decide. See *Charles Reinhart Co v Winiemko*, 444 Mich 579, 589; 513 NW2d 773 (1994). Our Supreme Court has held that, "a complaint cannot avoid the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999) (brackets, quotation marks, and citation omitted). The Court has provided that

> a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship;

[1] This Court reviews de novo a trial court's grant of summary disposition. *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007).

> and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions. [*Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 422; 684 NW2d 864 (2004).]

With regard to the first element:

> A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff. [*Id*.]

It is undisputed that the persons who ordered, performed, and delivered Yvonne's echocardiogram were, at the time, employees or agents of Covenant, which was subject to a contractual duty to provide professional health care services to Yvonne. Similarly, the nurses who failed to respond adequately to Yvonne's alarm were agents or employees of Covenant. Accordingly, the first element is met.

With regard to the second element:

> After ascertaining that the professional relationship test is met, the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of the jury's common knowledge and experience. If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. [*Bryant*, 471 Mich at 423.]

A. DELIVERY OF THE ECHOCARDIOGRAM RESULTS

Plaintiff argues that technicians and other non-professionally-licensed Covenant employees negligently delayed the delivery of the echocardiogram results. Plaintiff has maintained below, and on appeal, that the results were ordered "stat," i.e., immediately. However, a review of the record does not support that assertion. There is no stat order in the relevant medical documentation relating to the performance of the echocardiogram. Plaintiff's brief on appeal cites the performing echocardiogram technician's deposition for evidence of the stat order. However, there is nothing in the technician's deposition that supports such an assertion; in fact, the word "stat" or its equivalent does not appear anywhere in the deposition. Had the echocardiogram been ordered "stat," but then not promptly carried out or its results not communicated immediately, a negligence claim would lie because no medical judgment or technique would be at issue. Thus, a jury could rely on its own common knowledge, not expert

testimony, to determine whether the standard of care had been breached. However, there being no evidence of a stat order, any liability on the part of Covenant arose in the context of a medical judgment regarding how quickly the test needed to be performed and its results reported, i.e., whether to order that that test be performed "stat." To understand the standard of care applying to such a medical judgment, a jury would require expert medical testimony.

B. NURSES' DELAYED RESPONSE

Evaluation of the nurses' failure to quickly respond to Yvonne's alarm would also require presentation of expert testimony. Our Supreme Court has held that claims alleging negligent medical "staff training" and "patient monitoring" sound in medical malpractice. *Dorris*, 460 Mich at 47. Plaintiff's reliance on *Bryant* is unpersuasive. In that case, our Supreme Court found that claims regarding "the training of employees to properly assess" the risk of positional asphyxia posed by medical beds required professional judgment and thus sounded in medical malpractice. 471 Mich at 428-429. The Court distinguished this risk assessment from the plaintiff's claim that the defendant's staff had found decedent tangled in her bed and nearly asphyxiated the day before she asphyxiated herself in the same manner. *Id*. at 430-431. The Court held the plaintiff could pursue an ordinary negligence claim on those facts because the defendant's staff's failure to take corrective action *once they were aware of the danger* would allow a jury to "rely on common knowledge and experience in determining whether defendant ought to have made at attempt to reduce a *known risk of imminent harm* to one of its charges." *Id*. at 431 (emphasis added). In this case, however, plaintiff has not shown that the nurses were aware of any risk of imminent harm to Yvonne. Absent such a risk, the nursing decision when to respond to an alarm involves medical judgment concerning the particular facts at issue and the standard of care applied to nurses. See *David v Sternberg*, 272 Mich App 377; 726 NW2d 89 (2006) (failure to respond to patient complaints sounded in medical malpractice, not ordinary negligence). While the nurses may have been negligent, their negligence arose as a failure of medical judgment requiring expert testimony.

C. CONCLUSION – ORDINARY NEGLIGENCE

Because the estate did not have a viable ordinary negligence claim, plaintiff cannot establish that she was injured by Gaus's failure to investigate such a claim. Accordingly, the trial court did not err by granting summary disposition in favor of defendants on this basis.

III. ECONOMIC DAMAGES

Economic damages are not subject to a statutory cap in medical malpractice actions, MCL 600.1483, and plaintiff argues that Gaus committed legal malpractice by failing to investigate or pursue such a claim.

The record clearly demonstrates that Gaus never investigated or pursued an economic damages claim. However, to prevail in a legal malpractice action, plaintiff must show that Gaus's negligence in failing to pursue those damages caused an injury. *Manzo*, 261 Mich App at 712. That is, unless plaintiff can show that the settlement was inadequate because Gaus failed to consider economic damages, plaintiff cannot establish causation.

There is no evidence to establish that the value of the settlement would have been higher had an economic damages claim been pursued. Yvonne's medical bill was waived by Covenant as a part of the settlement and, therefore, could not be recovered as part of economic damages. As to Yvonne's wage-earning capacity, the only evidence of her work history was that after a long term, if not complete, history of unemployment, Yvonne obtained an $8-dollar-per-hour job one day before her death. No testimony was offered that she would have been able to perform even that job given her medical problems.

While both of plaintiff's expert witnesses opined that the settlement was inadequate, neither had any relevant information concerning economic damages other than knowledge of Yvonne's age. They were not asked to undertake any actual analysis of those damages in the context of Yvonne's health or employment history. Thus, their general testimony regarding the settlement value of a case involving the death of a woman Yvonne's age does not provide a sufficient foundation to constitute evidence of the value, if any, of an economic damages claim in this case.

In sum, plaintiff failed to offer evidence sufficient to establish that a viable claim for economic damages existed. Accordingly, plaintiff cannot demonstrate that Gaus committed legal malpractice by failing to investigate or pursue such a claim.

IV. CONCLUSION – LEGAL MALPRACTICE

Because plaintiff's underlying claims sound properly in medical malpractice, not ordinary negligence, and because plaintiff cannot show that Gaus's failure to investigate an economic damages claim resulted in injury, the trial court did not err by granting summary disposition in favor of defendant.[2]

V. ATTORNEY-CLIENT RELATIONSHIP

Our affirmance should not be read to indicate approval of the mechanism of legal retention and representation in this case. We have serious concerns about the structure of the Gaus-Huffman attorney-client relationship. We recognize that some hospitals have adopted an approach of confessing error to their patients when they believe the standard of care has been violated and that in many such cases the hospital will attempt to negotiate a fair settlement with the injured party without the need for suit.[3] We applaud such an approach and we do not exclude the possibility that, as part of that process, a hospital may agree to pay an hourly fee to the

[2] Because we find that the trial court did not err by granting summary disposition for the reasons discussed, we decline to address the court's alternate ruling that plaintiff's claims were at least partially barred by judicial estoppel. For the same reason, we need not address defendants' claims on cross-appeal that they were entitled to summary disposition on the grounds of judicial estoppel, collateral estoppel, and the attorney-judgment rule.

[3] Known as "disclosure-and-offer," this approach is allegedly more efficient and patient-friendly than the traditional "deny-and-defend" approach to medical malpractice claims.

attorney representing an injured party. However, it is, at minimum, ill-advised for a hospital to recommend an attorney, particularly one who has represented the hospital in the past or who contemporaneously represents it in other matters. No arrangement should be permitted where issues of client loyalty would challenge, or even appear to challenge, the attorney. Moreover, the role of the retained attorney must be clear and without ambiguity. While Gaus testified that his role was limited to setting up an estate and negotiating a settlement, his retention agreement laid out a far more comprehensive scope of representation: "We will serve as counsel in connection with the specific matter that you have retained us which involves wrongful death. We will render the ordinary and necessary legal services required in the course of this representation." The combination of a conflict of interest, even if waived, and an unclear scope of representation is all too likely to end poorly.

Affirmed.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro